IN THE
Supreme Court of the United States
October Term, 1978
No. 78-1418

WILLIAM E. BLOOMER, JR.,
Petitioner,

-against-

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 586 F. 2d 908. The opinion of the District Court is reported at 448 F. Supp. 652.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed is dated October 13, 1978 and was entered the same day.

The orders denying rehearing and rehearing en banc were

dated and entered January 18, 1979.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

When a longshoreman's suit against a shipowner results in a recovery exceeding the workmen's compensation lien, does the stevedore-employer (or compensation insurance carrier) recover its entire lien from the longshoreman's recovery, or must it share proportionately in the longshoreman's costs of obtaining that recovery, including attorney's fees?

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has rendered a decision in conflict with decisions by the United States Court of Appeals for the Fourth Circuit (*Swift v. Bolten,* 517 F. 2d 368 (1975) and the Fifth Circuit (*Mitchell v. Scheepvaart Maatschappij Trans-Ocean,* 579 F. 2d 1274 (1978), all of which have answered the question presented differently.

2. The Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

STATUTES WHICH THE CASE INVOLVES

33 U.S.C. §905. Exclusiveness of Liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as

required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426; Oct. 27, 1972, Pub. L. 92-576, § 18(a), 86 Stat. 1263.

33 U.S.C. §933. Compensation for Injuries Where Third Persons are Liable

Election of Remedies

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

Acceptance of Compensation Operating as Assignment

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Payment Into Section 944 Fund Operating as Assignment

(c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

Institution of Proceedings or Compromise by Assignee

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

Recoveries by Assignee

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

Institution of Proceedings by Person Entitled to Compensation

(f) If the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

Compromise Obtained by Person Entitled to Compensation

(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such

compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

Subrogation

(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

Right to Cmopensation as Exclusive Remedy

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided,* That this provision shall not affect the liability of a person other than an officer or employee of the employer.

Mar. 4, 1927, c. 509, § 33, 44 Stat. 1440; June 25, 1938, c. 568 §§ 12, 13, 52 Stat. 1168; Aug. 18, 1959, Pub. L. 86-171, 73 Stat. 391; Oct. 27, 1972, Pub. L. 92-576, § 15(f)-(h), 86 Stat. 1262.

STATEMENT OF THE CASE

This action was originally brought to recover damages for personal injuries sustained by petitioner on August 9, 1973 while working as a longshoreman aboard a vessel owned and operated by C. Y. TUNG and ECKERT OVERSEAS AGENCY, INC.[1] Jurisdiction was based on diversity of citizenship (28

1. These parties were named as defendants in the District Court. They have no interest in the outcome of this petition and have not been named as parties to this proceeding, pursuant to Rule 21 (4) of the Rules of this Court.

U.S.C. § 1332).

Petitioner was paid compensation benefits pursuant to the Longshoremen's and Harbor Workers' Compensation Act, (33 U.S.C. § 901 et seq.) by respondent, Liberty Mutual Insurance Company, the workmen's compensation insurance carrier for Connecticut Terminal Company, petitioner's employer. These benefits, including both disability payments and medical expenses, amounted to $17,152.83.

Counsel for petitioner and the shipowner agreed to a settlement of the action in the amount of $60,000, and while they were waiting for approval from their respective clients, Liberty Mutual Insurance Company requested permission from the District Court to intervene, which was granted.

Following approval of the settlement by both the petitioner and the shipowner, the petitioner moved for summary judgment on the intervenor's action for an order directing that the lien of Liberty Mutual Insurance Company for workman's compensation benefits be fixed in an amount so that it will bear proportionately with petitioner the costs of obtaining petitioner's recovery from the shipowner, including petitioner's attorney's fees.

This motion was denied and judgment was entered in favor of the intervenor, directing that it recoup its lien in full from the petitioner.[2] The Circuit Court affirmed.[3]

2. The distribution of the $60,000 pursuant to the lower Court's judgment was as follows:

Recovery	$60,000.00
less expenses	(202.80)
balance for distribution	$59,797.20
less fee of one-third	(19,932.40)
balance	$39,864.80
less entire lien of Liberty Mutual	(17,152.83)
net to Mr. Bloomer	$22,152.83

ARGUMENT

THE COURT OF APPEALS HAS RENDERED A DECSION IN CONFLICT WITH DECISIONS BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS.

Longshoremen injured on board vessels in the course of their employment receive benefits pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq.

Pursuant to 33 U.S.C. § 905 (b), when the longshoreman is injured as a result of negligence of the vessel's owner, he may bring a third-party action. However, the employer of the longshoreman (or its workmens' compensation insurance carrier) has a lien on the proceeds of the recovery in the third-party action (33 U.S.C. §933).

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3. Had petitioner prevailed and Liberty Mutual Insurance Company been required to share proportionately with petitioner his cost of obtaining the recovery, the $60,000 would be distributed as follows:

Recovery		$60,000.00
less expenses		(202.80)
balance for distribution		$59,797.20
less fee of one-third		(19,932.40)
balance		$39,864.80
entire lien of Liberty Mutual	$17,152.83	
less proportionate share of fees and expenses (.3355866 x $17,152.83)*	(5,756.26)	
	$11,396.57	(11,396.57)
net to Mr. Bloomer		$28,468.23

* Expenses of litigation amounted to $202.80, and counsel fees were $19,932.40. Total cost to petitioner, therefore, of recovering $60,000 amounted to $20,135.20, or 33.55866% of the amount recovered.

If the longshoreman should fail to bring the action against a responsible shipowner within six (6) months after a compensation award, the employer may bring such action (33 U.S.C. § 933(b)).

Although experience has revealed that these actions are seldom brought by stevedore employers as they hesitate to sue shipowners with whom they do business, Congress has clearly set forth in 33 U.S.C. §933 (e) how the proceeds of these actions should be disbursed. The statute, however, does not set forth the manner of distribution of the recovery when suit is brought by the longshoreman himself, and the Courts have been required to fill this void.

This has resulted in a nice variety of methods of dealing with the question presented in this petition, as was recognized by the Court of Appeals (App. p. 6a-13a).

> "We are mindful of the prevailing conflict between the circuit courts of appeals on this very question. E.g., Cella v. Partenreederei MS Ravenna, 529 F. 2d 15 (1st Cir. 1975) cert. denied, 425 U.S. 975, 96 S. Ct. 2175, 48 L. Ed. 2d 799 (1976); Swift v. Bolten, 517 F. 2d 368 (4th Cir. 1975); Chouest v. A & P Boat Rentals, Inc. 472 F. 2d 1026 (5th Cir.) cert. denied 412 U.S. 949, 92 S. Ct. 3012, 37 L. Ed. 2d 1002 (1973)."

A clear conflict exists between the decision of the Second Circuit in the instant case and the decision by the United States Court of Appeals for the Fourth Circuit in *Swift v. Bolten,* 517 F.2d 368 (4th Cir. 1975).

In the *Swift* case, the Court noted that with the advent of the 1972 Amendment to the Longshoremen's and Harbor Workers' Compensation Act, the longshoreman's employer was no longer required to indemnify the shipowner for a judgment in favor of the longshoreman (33 U.S.C. §905) and stated at page 370:

> "The longshoreman and the stevedore now have a common interest in the maintenance of the third-party action and both stand to gain from it. If the action is brought by

the longshoreman, the stevedore can sustain no liability and it will secure a definite pecuniary advantage, if the action is successful. Provided that pecuniary advantage is secured through the services of counsel employed by the longshoreman, the stevedore should be taxed with that part of a reasonable fee for the longshoreman's counsel as is proportioned to its share of the recovery. This is the rule that has been adopted in similar instances and that accords with settled equitable principles."

* * *

"After all, had the longshoreman not filed the action, the insurance carrier would have been forced to file an action to recover of the shipowner for its payments and would have incurred attorney's fees payable out of its recovery. It suffers no injury if it is forced, as we hold, to bear its proportionate share of the attorney's fees when the longshoreman files the action and makes full recovery on its behalf."

A third method of dealing with the compensation lien has been set forth by the United States Court of Appeals for the Fifth Circuit in the case of *Mitchell v. Scheepvaart Maatschappij Trans-Ocean,* 579 F. 2d 1274 (decided September 14, 1978).

On facts similar to the case at bar, the Fifth Circuit held that in each case the Court should review the reasonableness of counsel's fee and then determine ". . . to what extent the difference between a reasonable fee for the gross recovery and the attorney's fee paid by the plaintiff may justly be taxed against the compensation carrier. In reaching its last determination, the court should take into account the extent to which efforts of the carrier's own counsel contributed to securing the final recovery, and the respective recoveries of the plaintiff and the employer. Obviously, the carrier should in no case be charged with a greater portion of counsel's fee than the carrier's share of the gross recovery." (p. 1281)

The Court went on to state at page 1282:

"No one has here challenged the reasonableness of one-third of the gross recovery in this case as counsel's fee for his total effort. However, the lower court stated in its opinion that the compensation carrier "did furnish assistance which helped conclude a prompt settlement in Mr. Mitchell's favor." We remand the case for a calculation of the carrier's appropriate contribution to counsel's fee given whatever efforts were provided by carrier's counsel."

See also *Cella v. Partenreederei MS Ravenna,* 529 F. 2d 15 (1st Cir. 1975) cert. denied, 425 U.S. 975, 96 S. Ct. 2175 (1976), which held that the lien holder need not contribute any portion of its lien towards the fees and costs of making the recovery and *Brown v. American Mail Line, Ltd.,* 437 F. Supp. 628 (DC Oregon 1977), which criticized the rationale of the *Cella* case, supra, and followed *Swift v. Bolten, supra.*

As a result of the above conflict, had Mr. Bloomer been injured in the Port of Richmond rather than at a Port in New London, Connecticut, he would have netted an additional $5,756.26 from his law suit. Had he been injured in the Port of New Orleans, he could not know what his net recovery would be prior to his agreeing to a settlement and a determination by a District Judge of the amount of the attorney's fee and lien.

It is petitioner's position that the approach adopted by the United States Court of Appeals for the Fourth Circuit as expressed in *Swift v. Bolten,* supra, is the most equitable and practical.

To compel the longshoreman to pay the entire attorney's fee when a portion of the recovery inures to the benefit of the compensation lien holder is simply unfair. *Valentino v. Rickners Rhederei, G.M.B.H. etc.* 417 F.S. 176, aff'd 552 F.2d 466 (2nd Cir. 1977).

The argument has been made that pursuant to 33 U.S.C.§933(d) and (e) when the action is brought by the employer (lienholder against the shipowner and a recovery is made, the employer retains from the proceeds of the recovery the expenses he incurred in bringing the action against the shipowner, including his attorney's fees and the full amount of his lien and

that, similarly, he should receive the full amount of his lien without deduction of attorneys fees when the employee (longshoreman) brings the action. The circumstances, however, are, as a practical matter, not the same.

If the employer brings the action, he must pay an attorney and risk the loss of the attorney's fee if the case is lost or the recovery small. He subjects himself to discovery proceedings and all of the other inconveniences which must be suffered by an active litigant. He may become liable to a judgment for costs. If the employer assumes these liabilities and responsibilities, he is entitled to the benefits of the statutory distribution set forth at 33 U.S.C. § 933(e).

When the longshoreman brings the action, however, the employer gets a completely free ride. He is not a litigant, incurs no costs or liability for indemnity (33 U.S.C. § 905) and, pursuant to the decision of the Court of Appeals, stands to recoup the full lien at the complete expense of the longshoreman.

The holding by the Fifth Circuit that a determination be made on an individual case basis by the District Judge as to whether or not the employer should share in the costs of obtaining the recovery is certainly more equitable than a complete denial of any sharing.

This procedure, however, which might necessitate a hearing, is burdensome and except possibly for an unusual situation in which there is a great deal of partaicipation by counsel for the employer, unnecessary.

The employer's lien is statutory and there is no need for intervention (33 U.S.C. §933). When the longshoreman brings the action, his attorney is ultimately responsible for its prosecution and trial and, as a practical matter, there are very few instances where counsel for the employer provides any assistance.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

As noted at the beginning of this argument, every longshoreman injured on board a vessel in the performance of his duties recovers compensation benefits and medical expenses pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq.

Whenever such an injured longshoreman commences an action against the shipowner to recover damages for the shipowner's negligence, the longshoreman's employer or its insurance carrier has a lien on the longshoreman's recovery (33 U.S.C. §933).

Even when the injured longshoreman negotiates settlement of his claim against the shipowner, without litigation, the longshoreman's employer or its insurance carrier has a lien on the recovery.

The question presented to this Court by this petition, therefore, involves an important question of unsettled federal law in that it affects each and every *case* or *claim* brought by longshoremen against vessel owners for injuries sustained and complements a Federal statutory scheme for disposition of these matters.

For this reason and the fact that there is a three-way split of authority among the Circuits, it is respectfully suggested that this petition for a writ of certiorari be granted.

Dated: March 2, 1979

Respectfully submitted,

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(212) 227-2618
Counsel of Record for Petitioner

SHAFTER & SHAFTER
Attorney for Petitioner

RASSNER, RASSNER & OLMAN
Of Counsel for Petitioner

APPENDIX A
JUDGMENT SOUGHT TO BE REVIEWED

CORRECTED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Thirteenth day of October, one thousand nine hundred and seventy-eight.

Present:
HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
Circuit Judges

HON. JAMES S. HOLDEN
District Judge

WILLIAM E. BLOOMER, JR.,

Plaintiff-Appellant,

LIBERTY MUTUAL INSURANCE COMPANY as Subrogee of CONNECTICUT TERMINAL COMPANY,

Intervenor-Appellee,

vs.

C.Y. TUNG and ECKERT OVERSEAS AGENCY, INC.

Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO, Clerk
s/Arthur Heller
ARTHUR HELLER, Deputy Clerk

APPENDIX B
ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of January, one thousand nine hudnred and seventy-nine.

Present:
HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
Circuit Judges

HON. JAMES S. HOLDEN
District Judge

WILLIAM E. BLOOMER, JR.,

Plaintiff-Appellant,

LIBERTY MUTUAL INSURANCE COMPANY as Subrogee of CONNECTICUT TERMINAL COMPANY,

Intervenor-Appellee,

vs.

C.Y. TUNG and ECKERT OVERSEAS AGENCY, INC.,
Defendants.

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

s/ A. Daniel Fusaro
A. DANIEL FUSARO, Clerk

APPENDIX C
ORDER DENYING REHEARING IN BANC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of January, one thousand nine hundred and seventy-nine.

WILLIAM E. BLOOMER, JR.,

Plaintiff-Appellant,

LIBERTY MUTUAL INSURANCE COMPANY as Subrogee of CONNECTICUT TERMINAL COMPANY,

Intervenor-Appellee,

vs.

C.Y. TUNG and ECKERT OVERSEAS AGENCY, INC.

Defendants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/Irving R. Kaufman
IRVING R. KAUFMAN, Chief Judge

APPENDIX D
OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1187—September Term, 1977.

(Argued: June 22, 1978 Decided: October 13, 1978.)

Docket No. 78-7204

WILLIAM E. BLOOMER, JR.,

Plaintiff-Appellant,

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,

Intervenor-Appellee,

—v.—

C. Y. TUNG and ECKERT OVERSEAS, AGENCY, INC.,

Defendants.

Before:

LUMBARD and MANSFIELD, *Circuit Judges,*
and HOLDEN, *District Judge.**

Appeal from an order of the Southern District of New York, Charles H. Tenney, *Judge,* denying appellant longshoreman's motion for summary judgment to allocate to the successful stevedore-employer-intervenor a proportionate share of the attorney's fees incurred by the appellant longshoreman as plaintiff in pursuing his claim against defendant shipowner to settlement. The district court ordered that attorney's fees were to be awarded first from the sum recovered by the plaintiff upon settlement with the defendant, and the intervenor was to be reimbursed in full for the compensation lien it holds pursuant to 33 U.S.C. § 933(h), the Longshoremen's and Harbor Workers' Compensation Act.

Affirmed.

* Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

SHAFTER & SHAFTER, New York, N.Y., *for Plaintiff-Appellant* (Rassner, Rassner & Olman, of counsel); Alan C. Rassner on the brief.

SEMEL, MCLAUGHLIN & BOECKMAN, New York, N.Y., *for Intervenor-Appellee* (Douglas A. Boeckman and John M. Dellacarpini, of counsel); Douglas A. Boeckman on the brief.

KIRLIN, CAMPBELL & KEATING, New York, N.Y., *for Defendants.*

PER CURIAM:

The plaintiff longshoreman settled his personal injury claim against the shipowner in the amount of $60,000. Prior to settlement the intervenor, Liberty Mutual, as the workmen's compensation carrier for the stevedore-employer, had paid the longshoreman $17,152.83 in compensation benefits and medical expenses under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* The question for review is whether the intervenor's reimbursement from the settlement fund must be reduced by a proportionate share of the long-

shoreman's costs, including the fees of his attorney. Judge Tenney denied the plaintiff's motion to apportion. The court ordered full reimbursement to the intervenor after deduction of the plaintiff's attorney's fees, none of which was charged to the intervenor. The remainder of the settlement funds then were awarded to the plaintiff as additional compensation.

The plaintiff appeals from that aspect of the order of the district court which held that the insurer was not required to pay a proportionate share of the plaintiff's legal fees but must be reimbursed in full for its lien of $17,152.83. Since we are persuaded that the district court correctly construed the Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 933, as amended in 1972 by P.L. 92-576, 86 Stat. 1262, we affirm.

Prior to the 1972 amendment an injured longshoreman had a right of recovery against the shipowners for breach of warranty of seaworthiness, without establishing fault against the ship. *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 94 (1946). Later the developing law in this area afforded the shipowner an opportunity to seek indemnity from the stevedore for breach of the stevedore's warranty of workmanlike performance owing to the ship. *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.,* 350 U.S. 124, 134 (1956). These judicial antecedents to the 1972 amendment had the effect of imposing strict liability on the stevedore for the personal injuries suffered by its employee. The consequent circuity of claims increased the expense incurred by the employer and decreased the ultimate compensation received by the injured longshoreman. *Valentino* v. *Rickners Rhederei, G.M.B.H., SS Etha,* 552 F.2d 466, 468 (2d Cir. 1977). Conflicts of interest between the worker and the employer intensified, making the stevedore an adversary against the employee's recovery

from the third party responsible for the injury. *See Id.* at 470. *Russo* v. *Flota Mercante Grancolombiana,* 303 F. Supp. 1404, 1407 (S.D.N.Y. 1969).

In 1972 the Congress became mindful of these consequences and, particularly, the growing inadequacy of the levels of compensation received by the injured workmen, resulting from the heavy drain imposed on the employer's resources by reason of third party litigation.

> The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases.

H. Rep. No. 92-1441, 92d Cong., 2d Sess. in 3 U.S. Code Cong. & Admin. News, pp. 4698, 4702 (1972).

Accordingly, Congress eliminated the remedies for recovery available under the decisions in *Sieracki* and *Ryan.* The amended Act permits the injured longshoreman to receive compensation and also to maintain an action against the third party responsible for his injuries. He is allowed six months to commence suit. In the event he fails to commence the action within the appointed time and benefits have been paid him, the employer, or its

carrier, may maintain the action in its own behalf, as well as that of the injured employee. 33 U.S.C. §§ 933(b) & (h). If the subrogated action is successful the amount of the total recovery is allocated according to the statutory formula stated in § 933(e).[1] Thus, Congress has expressly provided that in a suit at the instance of the employer, or its carrier, the stevedore is entitled to full reimbursement of the compensation benefits paid to its employee, and its costs, including attorney's fees. The remainder of the excess, less one-fifth—"which shall belong to the employer"—shall be paid by the employer to the person entitled to compensation. 33 U.S.C. §§ 933(e)(1) & (2).

While the Act provides with particularity for the distribution of the fund recovered by way of judgment or settlement of the action pursued by the employer or its

1 33 U.S.C. § 933(c) reads:

> Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> (1) The employer shall retain an amount equal to—
>
> (A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);
>
> (B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;
>
> (C) all amounts paid as compensation;
>
> (D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and
>
> (2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

carrier, the Congress made no provision for the allocation of the funds recovered by the injured employee. Judge Tenney recognized that the statutory silence again burdened the court with making the allocation according to the statutory scheme as in *Valentino* v. *Rickners Rhederei, G.M.B.H., supra,* 552 F.2d at 468. The appellant contends that the rule formulated in *Valentino* controls the disposition of this appeal.

The applicable law reviewed in Judge Meskill's opinion in *Valentino* was written on a different slate. It was in the context of a litigated recovery by the longshoreman that was inadequate to satisfy the lien of the employer for compensation and medical expense previously paid. Because the $5,000 recovered by the longshoreman—"was insufficient to cover the lien of $15,488.13 for compensation and medical expenses, the employer claimed the entire recovery." *Id.* at 469. The court rejected the claim. This was done without disturbing the holding in *Fontana* v. *Pennsylvania R.R.*, 106 F.Supp. 461 (S.D.N.Y.), *aff'd sub nom. Fontana* v. *Grace Line, Inc.*, 205 F.2d 151 (2d Cir.), *cert. denied,* 346 U.S. 886 (1953). *Valentino, supra,* 552 F.2d at 470.

In *Fontana* the employee's settlement of his claim produced a fund that exceeded the cost of the litigation. The employee contended, as here, that the employer ought equitably to bear a proportion of his attorney's fees. Judge Weinfeld's opinion points out the statutory scheme opposed the contention.

> Thus, the Act treats the recovery as a fund charged first with the expense of the litigation and then with the amounts paid for compensation and medical expenses and the employee becomes entitled only to any excess finally remaining. There is no reason why a

> recovery obtained against the third party by the employee rather than the employer should be distributed differently. The expense of securing the recovery is, as in equity it should be, a first charge against the fund itself. As such it is immaterial whether the fund was created in a suit brought by the employer or one brought by the employee.

106 F.Supp. at 463-464.

We are mindful of the prevailing conflict between the circuit courts of appeals on this very question. *E.g. Cella* v. *Partenreederei MS Ravenna,* 529 F.2d 15 (1st Cir. 1975) *cert. denied* 425 U.S. 975 (1976); *Swift* v. *Bolten,* 517 F.2d 368 (4th Cir. 1925); *Chouest* v. *A & P Boat Rentals, Inc.,* 472 F.2d 1026 (5th Cir.) *cert. denied* 412 U.S. 949 (1973).[2] In the divergence of decisions we find Judge Coffin's explication in *Cella* of the statutory scheme more persuasive.

To be sure, the formula for distribution of the fund recovered through the efforts of the stevedore contained

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2 In *Chouest* a prime factor in the allocation of attorney's fees was the conflict of interest aspect of the limited recovery in that instance. The court's opinion by Judge Wisdom stresses the point.

> It offends both our prior decisions and the spirit of fairness which they embody to suppose that Travelers could hammer away at the plaintiff's case without paying a reasonable fee for the services of the plaintiff's lawyer which resulted in Traveler's financial benefit. We hold that an employer intervenor who benefits from the plaintiff's recovery against a shipowner must compensate the plaintiff's lawyer for his efforts when, as here, the employer-intervenor's counsel, by virtue of his client's third party defense, adopts a position at the trial which is totally adverse to the plaintiff's cause.

472 F.2d at 1031.

> Reallocation need be undertaken only in very limited circumstances. . . . In the present case we hold that reallocation is likewise mandated where the intervenor's attorney contributes nothing of material assistance to the plaintiff's case, and instead devotes his efforts to undermining it.

472 F.2d at 1037.

in 33 U.S.C. § 933(e) does not specify the allocation of the recovery obtained by the injured employee, yet it unfolds the sense of the statutory purpose of the 1972 amendments—"to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for payment of the increased benefits under the Act." *Cella, supra,* 529 F.2d at 20.

The distribution of the fund ordered by the district court resulted in no windfall to the intervenor. It merely satisfied the statutory lien in keeping with the legislative purpose. It is consistent with the prior decision of this court in *Fontana, supra;* it is not at variance with the teaching in *Valentino, supra.* The order is affirmed.

APPENDIX E
MEMORANDUM

Docket Number 74 Civ 1422(CHT) Entered March 28, 1978
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM E. BLOOMER, JR.,

Plaintiff,

LIBERTY MUTUAL INSURANCE COMPANY
as subrogee of CONNECTICUT TERMINAL COMPANY,

Intervenor,

-against-

C.Y. TUNG and ECKERT OVERSEAS AGENCY, INC.,

Defendants.

APPEARANCES

For Plaintiff:
RASSNER, RASSNER and OLMAN
15 Park Row
New York, N.Y. 10038

Of Counsel: ALAN C. RASSNER, ESQ.

For Intervenor:
SEMEL, McLAUGHLIN & BOECKMANN
10 Rockefeller Plaza
New York, N.Y. 10020

Of Counsel: JOHN M. DELLICARPINI, ESQ.

TENNEY, J.

The individual plaintiff longshoreman was injured aboard defendants' vessel, instituted an action to recover for his injuries, and settled his claim against the defendants in the amount of $60,000. After the injury and before settlement, plaintiff was paid a total of $17,152.83 in workmen's compensation and medical benefits by his employer's subrogee, the intervenor Liberty Mutual Insurance Company. *See* Longshoremen's and Harbor Workers' Compensation Act ("Act"), 33 U.S.C. §§ 901 et seq. The statutory scheme contemplates that a lien arise in favor of the payor of any such compensation in case of a recovery against a third party. 33 U.S.C. § 933. Therefore, because plaintiff has recovered far in excess of his compensation benefits, the insurer will be fully reimbursed from the settlement fund.

The plaintiff has now moved this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Rules") for an order declaring that the insurer be required to bear a proportionate share of the attorney's fees incurred by the individual plaintiff in litigating his claim to settlement. Upon examination of the law in this Circuit, the Court concludes that the plaintiff's request must be denied.[1]

In 1972 the Congress restructured the laws governing work-related injuries to longshoremen and jettisoned cumbersome accretions to the prior law in favor of more certain and generous compensation to the protected class. After 1946 and until 1972, longshoremen had been permitted to invoke the unseaworthiness doctrine of liability without fault against the shipowner, *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946);

after 1956 the shipowner could seek indemnity from the stevedore based on a warranty of workmanlike performance. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). "The net result in most cases was that the stevedore became liable without fault for injuries to its employees." *Valentino v. Rickners Rhederei, G.M.B.H.*, 552 F.2d 466, 468 (2d Cir. 1977).

Since the 1972 amendments the *Sea Shipping* and *Ryan* doctrines have been abolished, and currently an injured longshoreman has six months in which to sue the shipowner for negligence, hoping to recover more than the compensation benefits he is still paid under the statutory scheme. In the event the longshoreman does not sue within six months, the stevedore may sue in the longshoreman's name. In the latter case the statute provides for the stevedore to retain from the judgment or settlement against the third party an amount equal to the compensation already paid out to the longshoreman, plus costs and attorney's fees. The excess, if any, is shared between stevedore and longshoreman according to a statutory formula. However, the statute is silent as to the distribution of the recovery in the event suit is brought by the longshoreman.

That silence confronted the United States Court of Appeals for the Second Circuit in *Valentino, supra,* forcing the court to formulate a rule "that complements the statutory scheme." 552 F.2d at 468. Although *Valentino* had quite different facts from the instant case, a close reading of the opinion and its juridical antecedents leads this Court to conclude that the theory it endorses is dispositive of these facts as well.

In *Valentino* the court of appeals was called upon to determine whether under the amended law attorney's fees would be paid out of the recovery where the longshoreman recovered *less* than the benefits already paid out by the stevedore. A decision in favor of deducting attorney's fees from the recovery would have meant that the stevedore's recoupment on its lien would be diminished and, in effect, that the stevedore would have paid for the longshoreman's attorney. The court below concluded

that the attorney should be paid from the recovery, *see Valentino v. Rickners Rhederei, G.m.B.H.*, 417 F. Supp. 176 (E.D.N.Y. 1976) (Weinstein, J.), and that decision was affirmed. However, the affirmance did not endorse Judge Weinstein's broad recommendation that a "rule of proportional sharing [should] apply to attorneys fees in longshoremen's suits no matter what the recovery." *Id.* at 178.

Of course, the proportional sharing theory is precisely what plaintiff is advocating here. The concept of proportional sharing is predicated on the fact that the 1972 amendments to the Act have allied the longshoreman and the stevedore is seeking recovery against a third party. A fortiori, it is contended that when the longshoreman sues, the stevedore should be required to pay pro rata for the services of the longshoreman's attorney, for it is through the latter's efforts that a recovery accrues out of which the stevedore recoups the compensation he paid to the longshoreman. However, although the court of appeals acknowledged in *Valentino* that "[t]he stevedore should not realize a windfall simply because its employee has chosen to exercise a right granted by Congress," 552 F.2d at 469, it did not endorse Judge Weinstein's theory of proportional sharing and instead hewed to principles enunciated in *Fantana v. Pennsylvania R.R.*, 106 F. Supp. 461 (S.D.N.Y. 1952) (Weinfeld, J.), *aff'd sub nom. Fontana v. Grace Line, Inc.*, 205 F.2d 151 (2d Cir.), *cert. denied,* 346 U.S. 886 (1953). In the course of its opinion the court of appeals overruled *Spano v. N.V. Stoomvaart Maatschappij "Nederland"*, 340 F. Supp. 1194 (S.D.N.Y. 1971), and *Russo v. Flota Mercante Grancolombiana,* 303 F. Supp. 1404 (S.D.N.Y. 1969), cases purporting to depend on *Fontana* for support.

This somewhat anomalous situation was explained by the *Valentino* court in the following way: In *Fontana* the plaintiff longshoreman sued and recovered only slightly more than what had been paid him in compensation; after satisfaction of the compensation lien and payment of attorney's fees, he would have had little or nothing for himself. Nevertheless, Judge

Weinfeld ruled that the statute "treats the recovery as a fund charged first with the expense of the litigation and then with the amounts paid for compensation and medical expenses" and that "[t]he expense of securing the recovery is . . . a first charge against the fund itself." 106 F. Supp. at 463-64, *quoted with emphasis in Valentino, supra,* 552 F.2d at 469-70. Judge Weinfeld saw no reason to distort the statutory plan simply because it was the longshoreman who sued and not the stevedore; consequently the employer received whole whatever he had paid in compensation and the longshoreman's attorney likewise received his fee from the recovery.

After the *Fontana* doctrine was enunciated, the Supreme Court issued the *Ryan* decision which gave the shipowner indemnity as against the stevedore. Thereafter the *Russo* and *Spano* cses arose. In those cases, as in *Valentino,* the fund recovered upon the longshoreman's suit was inadequate to reimburse the stevedore for compensation paid out. However, at this point in the development of the law it was often the stevedore who was funding the recovery under the *Ryan* indemnity doctrine. Thus, to have deducted attorney's fees from the recovery which, under *Ryan*, might be coming from one pocket of the stevedore only to be returned to the other pocket in satisfaction of the statutory lien was to "charge the stevedore for the privilege of being sued." *Valentino, supra,* 552 F.2d at 470. To avoid this inequity, the *Russo* and *Spano* courts fastened on that aspect of *Fontana* which construed the governing statute to first make the stevedore whole, *Spano, supra,* 240 F. Supp. at 1196, and the rule became one of primacy of the stevedore's lien over the attorney's lien where the longshoreman sued and there was a shortfall between recovery and compensation paid out. *Russo* and *Spano* made no reference to the fact that the Act contemplated only that scenario where the stevedore sued and was obliged to pay his own attorney's fees, or that the Act's concept of "making the stevedore whole," as construed in *Fontana,* included paying the attorney out of the fund recovered. Instead, *Russo* and *Spano* justified the fee

refusal on the theory that the attorney had produced no benefit for either his longshoreman client or for the stevedore, who was at this point indemnifying himself under *Ryan.*

When the Congress abolished the unseaworthiness and stevedore's indemnity doctrines in favor of direct negligence suits by the longshoreman or stevedore against the third party shipowner, the potential conflict of interest between the longshoreman and stevedore evaporated. The *Valentino* court therefore reasoned that the way was paved for overruling *Russo* and *Spano*[2] to permit attorney's fees to be deducted from the fund recovered from the third party, regardless of the amount of the fund. On the *Valentino* facts, *i.e.,* less recovery than compensation paid out, the stevedore had at least recouped some of what it had already paid, and that much only through the efforts of the longshoreman's attorney. Equity therefore dictated that "a lawyer who creates a fund for the benefit of another is entitled to reasonable compensation for his efforts." *Valentino, supra,* 552 F.2d at 468-69. Furthremore, although the instant facts were not before the court of appeals in *Valentino,* and although the *Valentino* court stated that *Fontana* "does not address the situation we have here, where the longshoreman does not share in the recovery and only the stevedore can pay," *id.* at 470, *Valentino* disposes of the facts sub judice with this statement: "[In disapproving *Russo* and *Spano*] we do not disturb Fontana's holding on the allocation of the attorney's fee *from the award." Id.* (emphasis added). Indeed, the allocation of the attorney's fee from the insufficient award in *Valentino* is entirely consistent with this Court's conclusion that the fundamental principle of *Fontana* has been affirmed sub silentio as to recoveries such as the one at bar which are adequate to reimburse the lienor and the attorney: it is the fund recovered that is charged—first for the cost of the recovery, including attorney's fees whether incurred by the longshoreman or the stevedore; next in reimbursement of the stevedore; and finally as additional compensation for the plaintiff longshoreman.

For the foregoing reasons, summary judgment is denied to the plaintiff and awarded instead to the intervenor Liberty Mutual Insurance Company as subrogee of the stevedore Connecticut Terminal Company. Attorney's fees are to be awarded first from the sum recovered by plaintiff upon settlement with the defendant, and the intervenor is to be reimbursed in full for the compensation lien it holds pursuant to 33 U.S.C. § 933(h).

Settle judgment on notice.

Dated: New York, New York
March 27, 1978

CHARLES H. TENNEY
U.S.D.J.

FOOTNOTES

1. There is a split of authority in the circuits which have addressed this question. *Compare Chouest v. A & P Boat Rentals, Inc.*, 472 F.2d 1026 (5th Cir.), *cert. denied,* 412 U.S. 949 (1973) (recovery exceeded stevedore's lien by modest sum; legal fees paid proportionately by plaintiff and lienor), *and Swift v. Bolten,* 517 F.2d 368 (4th Cir. 1975) (recovery ample to cover lien and attorney's fees with balance to longshoreman-plaintiff; proportional sharing of legal fees ordered), *with Cella v. Partenreederei MS Ravenna,* 529 F.2d 15 (1st Cir. 1975), *cert. denied,* 425 U.S. 975 (1976) (declining to follow *Swift, supra,* court found congressional intent to fully reimburse stevedore and to deduct attorney's fees from longshoreman's recovery in excess of benefits).

2. The same rationale as supported the *Russo* and *Spano* cases in this circuit underlay the Fourth Circuit decision in *Ballwanz v. Jarka Corp.*, 382 F.2d 433 (4th Cir. 1967); likewise, the 1972 amendments and the resolution of the conflict of interest between longshoreman and stevedore led the Fourth Circuit to hold *Ballwanz* no longer applicable. *Swift, supra,* 517

F.2d at 369-70. Despite plaintiff's assertion that this circuit "clearly adopted and, in fact, stated that it reached the same conclusion as the Fourth Circuit in *Swift,*" Plaintiff's Reply Memorandum 3, there is no hint in *Valentino* that the court of appeals "adopted" the proportional sharing theory endorsed by *Swift,* or that the case was cited by the court of appeals in this circuit for any other than the limited proposition that the 1972 amendments obviate the need to refuse counsel fees where the longshoreman's recovery is inadequate.